# No. 15,355

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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SHEET METAL CONTRACTORS ASSOCIATION OF SAN FRANCISCO, a California corporation, et al.,

*Appellants,*

vs.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, et al.,

*Appellees.*

On Appeal from Order and Judgment of District Court.

## BRIEF ON BEHALF OF APPELLANTS.

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### JURISDICTION.

This action arose under the provisions of Section 302 subdivisions (a) and (b) of the Labor Management Relations Act, 1947, as amended (29 U.S.C. sec. 186), and jurisdiction of said action was conferred upon the Court below by the provisions of Section 302 subdivision (e) LMRA 1947 (paragraphs 1 and 2 of the complaint for injunction). (R. 5, 6.)

Plaintiffs and appellants are employers of employees employed in an industry affecting commerce

(Stipulation of Facts paragraphs 1, 2 and 3, R. 17) and defendant Local Union No. 75 is a representative of employees of plaintiffs who are employed in an industry affecting commerce. (Stipulation of Facts paragraphs 3 and 4, R. 18.)

This Court has jurisdiction to review the judgment and order in question under the provisions of Title 28 United States Code Section 1291.

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## STATEMENT OF THE CASE

Plaintiffs are employers engaged in the sheet metal business in the City and County of San Francisco. As such they have made and entered into a collective bargaining agreement with defendant Local Union No. 104. This agreement provides in part:

> "Section 4. When sent by the employer to supervise or perform work * * * outside the jurisdiction of the Union and within the jurisdiction of another Local Union * * * the employers shall be otherwise governed by the established working conditions of said Local Union." (Stipulation of Facts, Ex. A, R. 24.)

Defendant Local Union No. 75 and Associated Heating and Sheet Metal Contractors, Inc., made and entered into a collective bargaining agreement covering the sheet metal work performed in Marin, Sonoma, Mendocino, Lake, Napa and Solano counties (hereinafter referred to as Northern California counties.) (Stipulation of Facts Exhibit "B".) (R. 26.)

Among other provisions of said agreement is a provision for a Joint Industry Board appearing in the addenda to such union agreement (paragraph 19 subsection (a)) (R. 28), requiring each employer to contribute to the Joint Industry Board fund the sum of two and one-half cents (2½¢) an hour for each hour worked by all journeymen performing work within the jurisdiction of Local Union No. 75.

When certain of the plaintiffs that is the San Francisco Sheet Metal employers undertook to perform sheet metal work in any of the Northern California counties covered by defendant Union Local 75's jurisdiction and contract, defendant Local Union 75 demanded that plaintiffs and each of them pay the sum of two and one-half cents (2½¢) an hour into the Joint Industry Board fund, and when plaintiff employers refused to do so defendant Local Union No. 75 threatened to encourage, cause and induce the employees of plaintiffs to refrain from performing any work for them in the Northern California counties unless and until the plaintiffs and each of them paid the sum of two and one-half cents (2½¢) an hour into said Joint Industry Board fund. (Complaint paragraph II, R. 9; Stipulation of Facts paragraph 10, R. 20.)

Thereafter plaintiff employers commenced paying said sums into said Joint Industry Board fund but have notified defendant Local Union No. 75 that they are doing so solely because of the acts of defendants above set forth and have filed suit in the District Court below for an injunction under the provisions of Sec-

tion 302 (e) LMRA 1947. (Complaint, Third Cause of Action paragraph II, R. 10.) (Stipulation of Facts paragraph 10, R. 20.)

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## SPECIFICATION OF ERRORS.

1. The Court below erred in failing to hold that payments by appellant employers into the Joint Industry Board fund constituted payments of money or other thing of value by employers to a representative of their employees who are employed in an industry affecting commerce.

2. The Court erred in granting defendant's motion for summary judgment.

3. The Court erred in denying plaintiff's motion for summary judgment.

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## SUMMARY OF ARGUMENT.

The District Court below, in ruling that payments to the Joint Industry Board fund did not constitute payments to a representative of employees, relied primarily on the decision of the United States Court of Appeals for the Third Circuit in *United Marine Division v. Essex Transportation Co.,* 216 Fed. (2d) 410. That case, however, involved a welfare fund. More specifically, as stated in the first sentence of the opinion, it was a pension trust. The trust in that case therefore *complied* with the requirement of Section 302 that it be for the *sole and exclusive benefit of employees* and their families. The trust was managed

by trustees chosen half by the employer's association and half by the union, and as the Court said:

> "The terms under which they act were *carefully spelled out.*" (Emphasis supplied.)

In the *Essex* case therefore it would be impossible for the trustees to apply any of the monies in the trust for the benefit or advantage of the *union as such* without *violating* the specific terms and provisions of the trust. In the present case, however, the purposes of the Joint Industry Board and the uses to which its fund may be applied are so broad and vague *that without violating* the so-called "trust agreement", the monies in the fund could be applied to a variety of purposes which the union as such desires or which are to the advantage or benefit of the *union as such.*

Secondly, the union has such a degree of control over the so-called trustees that the Joint Industry Board fund is in fact jointly controlled by the union and by the employer association and not by the so-called trustees.

Thirdly. To the extent that the *Joint Industry Board has taken over some of the functions of the union,* such as settling disputes, arbitrating and administering an apprenticeship program, the Joint Industry Board funds are used to *defray part of the expenses of the union.*

The Court below itself recognized the distinction between this "trust" and the *Essex* trust, saying:

> "The distinction between the *Essex* case and the case at bar is the fact that in the Essex case the

> fund in question was a *welfare fund,* whereas in the instant case the fund does not include the welfare and pension funds and is *subject to expenditure on purposes of a rather large and vague nature.*" (Emphasis supplied.)

To summarize: Appellants contend that the very *broad scope* of purposes and activities the Joint Industry Board together with the *degree* of *control* exerted by the union over half of the trustees is sufficient to constitute the employer contributions payments of monies or other thing of value to a representative of their employees.

In answer to the argument that the Joint Industry Board funds may conceivably be used to defray general union expenses, the Court below quoted a statement from the opinion in *Upholsterers International Union v. Leathercraft Furniture Co.,* 82 Fed. Supp. 570, as follows:

> "Whenever the trustees use or attempt to use, directly or indirectly, the fund for a purpose other than for the sole and exclusive benefit of the employee members, this court when called upon will enjoin the trustees from making the improper expenditures. The burdening of the fund with undue administrative expenses or lush salaries for union officials will not be tolerated."

This statement overlooks two facts. First, the fund in the *Upholsterers* case was obviously for the *sole and exclusive benefit of employee members* (see above) and therefore no part of this fund could be diverted to the benefit or advantage of the union as such *with-*

*out violating the trust agreement* itself. In this case, as stated above, the Joint Industry Board agreement is so broad and vague that there are many applications of the fund which can be made *without violating the trust* which will result in a distinct benefit or advantage to the union as such including payment of part of its operating expenses.

Second. Plaintiffs and appellants, not being parties to the agreement with Local No. 75, or represented on the Joint Industry Board, would have no means of knowing of any misapplication of Joint Industry Board funds.

Finally, it is submitted that in enacting Section 302 LMRA 1947 the Congress did not intend merely to prohibit bribes and extortions or undue administrative expenses or lush salaries for union officials but intended to forbid *all payments of any kind to representatives of employees* however laudable their purpose might be, however carefully administered and audited, excepting only payments into trusts jointly administered by such representatives and by employers *for the sole and exclusive benefit of the employees themselves* and their families.

As was said by the Supreme Court in the *Ryan* case (*U. S. v. Ryan,* 100 L. Ed 272):

> "As the statute reads, it appears to be a criminal provision *malum prohibitum which outlaws all payments,* with stated exceptions, between employer and representative." (Emphasis supplied.)

## ARGUMENT.

### PURPOSE OF THE LEGISLATION.

A study of the Legislative History of the Act will serve to clarify the intent and purpose of Section 302. The Legislative History shows that certain members of Congress were deeply concerned over the growth and spread of so-called "welfare funds" for broad and vague purposes and offered the legislation embodied in Section 302 for the specific purpose of *forbidding* any payments into any funds wholly or partially controlled by unions except funds for the exclusive benefit of employees with their benefits clearly specified.

A supplement to Senate Report on Senate Bill 1126, signed by Robert A. Taft, Joseph H. Ball, Forrest C. Donnell and W. E. Jenner, appears at page 458 of Legislative History LMRA 1947 and reads in part as follows:

> "An amendment reinserting in the bill a provision regarding so-called welfare funds similar to the section in the Case Bill approved by the Senate at the last session. It does not prohibit welfare funds but merely requires that, if agreed upon, such funds be jointly administered—be, in fact, trust funds for the employees, with definite benefits specified, to which employees are clearly entitled, and to obtain which they have a clear legal remedy. The amendment proceeds on the theory that union leaders should not be permitted, without reference to the employees, to divert funds paid by the company, in consideration of the services of employees, to the union treasury

or the union officers, except under the process of strict accountability."

* * * * * * *

"The necessity for the amendment was made clear by the demand made last year on the part of the United Mine Workers that a tax of 10 cents a ton on coal be paid to the Mine Workers Union *for indiscriminate use for so-called welfare purposes.* It seemed essential to the Senate at that time, and today, that if any such huge sums were to be paid, representing as they do the value of the services of the union members, which could otherwise be paid to the union members in wages, the use of such funds be strictly safeguarded." (Emplasis supplied.)

In the consideration of this measure by the Senate, Senator Taft took the floor and expressed himself as follows (Leg. His. LMRA 1947, p. 1310 to p. 1313):

"Mr. Taft. Mr. President, the amendment was explained yesterday by the Senator from Minnesota (Mr. Ball) and the Senator from Virginia (Mr. Byrd). It is substantially the same as the amendment which was adopted by the Senate last year as part of the so-called Case bill, which amendment was offered by the Senator from Virginia. The occasion of the amendment was the demand made by the United Mine Workers of America that a tax of 10 cents a ton be levied on all coal mined, and that the tax so levied be paid into a general welfare fund to be administered by the union for *practically any purpose the union considered to come within the term 'welfare'.* Of course, the result of such a proceeding, if there is no restriction, is to build up a

tremendous fund in the hands of the officers of the labor union, to be distributed for welfare, which they may use indiscriminately. *There is no specific provision with respect to it. They may distribute it to members of the union whom they like or they consider proper charity cases, and they may refuse to distribute it to other members whom they do not like.* (Emphasis supplied.)

"The demand originally made by Mr. Lewis was so broad that practically the fund became a war chest, if you please, for the union. The money for welfare funds is deducted from the wages of the employees. It is money earned by the employees, and certainly *there should be some restriction* on the right of those who bargain collectively for the employees of any company, *as to how far they can take the money earned by the employees and use it for union purposes without restriction.* Obviously, the man who is bargaining should have no right to obtain any personal advantage." (Emphasis supplied.)

Later Mr. Taft said as follows (Leg. His. LMRA 1947, p. 1311):

"Provision No. (5) at the bottom of page 2 and the top of page 3 of the amendment deals with the question of welfare fund. It provides that the payments must be made, in the first place, as found in line 25 on page 2, 'to a trust fund established by such representative'—that is by the union—'for the sole and exclusive benefit of the employees of such employer, and their families and dependents, or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents.'

"In other words, this must be a trust fund. *It cannot be the property of the union* without a definite statement *that it is in trust for the employees, who, after all have earned the money.*" (Emphasis supplied.)

Thereafter, as an example of what the legislation was designed to correct Mr. Taft referred to the coal miners' fund as follows (Leg. Hist. LMRA 1947, p. 1312):

"What was actually done by the Government when it agreed with Mr. Lewis? This is the agreement with respect to the United Mine Workers' fund:

'There is hereby provided a health and welfare program in broad outline—and it is recognized that many important details remain to be filled in—such program to consist of three parts, as follows:

'(a) A welfare and retirement fund: A welfare and retirement fund is hereby created and there shall be paid into said fund by the operating managers 5 cents per ton on each ton of coal produced for use or for sale. This fund shall be managed by three trustees, one appointed by the Coal Mines Administrator, one appointed by the president of the United Mine Workers, and the third chosen by the other two.'

"In this case the Government is the employer.

'The fund shall be used for making payments to miners, and their dependents and survivors, with respect to (1) wage loss not otherwise compensated at all or adequately under the provisions of Federal or State law and resulting from sickness (temporary disability), permanent disability, death or retirement, and (2) *other related welfare purposes, as determined by the trustees.* Subject to the stated purposes of the fund, the trustees shall have full authority with respect to questions of coverage and eligibility, priorities among classes of benefits, methods of providing or arranging for provision of benefits, and all related matters.' (Emphasis supplied.)

"This represents money earned by the employees, in the form of a tax of 5 cents a ton, which

is turned into a fund, *and two private persons, without restraint, have almost unlimited authority to determine how the money shall be spent.* Whether the words *'other related welfare purposes'* make it unnecessary to furnish a definite statement, as required by this amendment, is a question. It is left entirely in the choice of two men, who do not have particularly at heart the interests of the public, to determine the terms under which the money shall be distributed.

*"The purpose of the amendment is to require that the fund shall be established in definite, detailed form, in the form of a trust fund, with respect to which the employees can determine their rights and can insist upon them."* (Emphasis supplied.)

It is thus clear from the above passages from the Legislative History that the Congress in enacting Section 302 intended to forbid payments by employers into funds even though jointly controlled by employers and representatives of their employees where the funds were managed by two private persons (or groups of persons) who had "almost unlimited authority to determine how the money should be spent."

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### LEGISLATIVE PRINCIPLES APPLIED TO JOINT INDUSTRY BOARD.

The so-called Joint Industry Board Fund here involved is exactly the type of fund Congress intended to prohibit by Section 302 for the following reasons:

There is, in fact, no trust.

There are no beneficiaries except the union and the employer association. The purposes of the fund are so broad and vague the monies can be used for *any purpose representatives of both sides agree upon.*

Finally the purposes specified include the expenditure of assets of the fund for the purpose of *defraying the cost of at least some activities normally carried on by the union.* This constitutes a "thing of benefit" to the union.

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**NO TRUST WAS CREATED.**

Although the document creating the Joint Industry Board is headed "Trust Agreement", it is notworthy that no trustees are named, created or appointed.

A Joint Industry Board is created, and one of the functions of the Joint Board is to "supervise, administer and carry out all funds provided for by the Bargaining Agreement." (Stipulation of Facts, Ex. C, paragraph A(1), R. 30.)

This, however, does not constitute the members of the board trustees. On the contrary, the power reserved to the union and the association to remove and replace their representatives on the Joint Industry Board constituted by the board members *mere servants or agents.*

The Joint Industry Board agreement provides:

> "B—3. *The designation of any representative may be revoked at any time at the pleasure of the*

*party making the appointment.* Any vacancy on the Board, caused by death, resignation, or revocation of the designation shall be filled by the Union or Employers, respectively, as the case may be. Notice of any new designation is to be given in writing to the Secretary of the Board." (R. 32.) (Emphasis supplied.)

"E—*Absentees:* If for any reason a member of the Joint Industry Board cannot be present at a meeting, the Union and the Employer Groups, respectfully, shall have the power and authority to appoint another person automatically to act as an alternate and take the place of the absent Board member at a meeting or meetings. This person shall sit at these meetings as a member of the Board, with full power to vote and act upon all questions and resolutions that shall come up at that meeting or meetings in which the said alternate shall sit for the absent Board member." (R. 33.)

The question whether persons designated trustees are actually trustees or merely *agents or servants who hold legal title to property for the convenience of their principals* has frequently been considered in cases involving Massachusetts trusts. A fair statement of the law my be found in *Goldwater v. Altman,* 210 Cal. 408 at 416, as follows:

"Generally stated, a trust of this nature is created wherever several persons transfer the legal title in property to trustees, with complete power of management in such trustees free from the control of the creators of the trust, and the trustees in their discretion pay over the profits of

the enterprise to the creators of the trust or their successors in interest. As thus defined it is apparent that such a trust is created by the act of the parties and does not depend on statutory law for its validity. In the case of *Hecht v. Malley,* 265 U. S. 144, 146 (68 L. Ed. 949, 44 Sup. Ct. Rep. 462, 463), Mr. Justice Sanford referred to such organizations as follows:

> 'The "Massachusetts trust" is a form of business organization, common in that state, consisting essentially of an arrangement whereby property is conveyed to trustees, in accordance with the terms of an instrument of trust, to be held and managed for the benefit of such persons as may from time to time be the holders of transferable certificates issued by the trustees showing the shares into which the beneficial interest in the property is divided. These certificates, which resemble certificates for shares of stock in a corporation and are issued and transferred in like manner, entitle the holders to share ratably in the income of the property, and, upon termination of the trust, in the proceeds.
>
> 'Under the Massachusetts decisions these trust instruments are held to create either pure trusts or partnerships, according to the way in which the trustees are to conduct the affairs committed to their charge. *If they are the principals and are free from the control of the certificate holders in the management of the property, a trust is created; but if the certificate holders are associated together in the control of the property as principals and the trustees are merely their managing agents, a part-*

*nership relation between the certificate holders is created.'*

"The leading case in Massachusetts where this so-called control test is fully discussed is *Williams v. Inhabitants of Milton,* 215 Mass. 1 (102 N.E. 355). In that case the question involved was whether the Boston Personal Property Trust was to be taxed as a partnership or as a trust. The court, after discussing certain cases holding the particular trust therein involved created a partnership, and others where it had been held that a trust had been created, stated (102 N.E. 357) that the distinction 'lies in the fact that in the former cases the certificate holders are associated together by the terms of a "trust", and are the principals *whose instructions are to be obeyed by their agent who, for their convenience, holds the legal title to their property, the property is their property, they are the masters;* while in *Mayo v. Moritz* (151 Mass. 481 24 N.E. 1083), where it was held the instrument created a trust), on the other hand, there is no association between the certificate holders, the property is the property of the trustees and the trustees are the masters. All that the certificate holders in *Mayo v. Moritz* had was a right to have the property managed by the trustees for their benefit. They had no right to manage it themselves nor to instruct the trustees how to manage it for them.' " (Emphasis supplied.)

(See also *Bernesen v. Fish,* 135 Cal. App. 588.)

It cannot be doubted that the so-called "trustees" of the Joint Industry Board fund were under the absolute control of their principals. Either they carried out the directions of their principals or they were

removed and replaced by someone who would follow orders. The Joint Industry Board agreement was intentionally drawn to so provide.

In legal effect, therefore, the payments into the Joint Industry Board fund were exactly the same as payments into a *joint bank account* in the names of the union and the association. It is true that monies could not be withdrawn or expended from such fund except upon the consent and signature of both parties but it is obvious that when the employers vested the union with a one-half interest in and one-half control over such fund they *conferred upon or paid to the union representing their employees a "thing of value"* contrary to the statute.

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BENEFICIAL INTEREST IN THE UNION.

Who were the beneficiaries of the trust? Who "owned the money" in the fund?

There were no beneficiaries of the Joint Industry Board fund except the *union itself* and the *employer association.* Certainly *there were no employee beneficiaries who could take legal action to enforce their rights such as there were in the Essex case* and such as there are in the case of every pension or medical and hospital trust. Consequently, the only parties who had any voice or legal rights in saying how the monies were to be expended were the union and the employer association. They were, in effect, *trustees for themselves.*

Section 302 was intended to prohibit just this kind of trust. The Legislative History of the Labor Management Relations Act 1947 shows at page 1302 that Senator Ball offered Section 302 as an amendment to the Taft-Hartley Act. Senator Ball said (p. 1304):

> "All that it requires is that the so-called welfare fund shall be jointly administered by representatives of the employer and the union; that the specific purposes of the fund and the benefits to which employees are entitled shall be set forth in detail in the agreement creating the fund and that it shall be in the nature of a trust fund *so that employees receiving benefits from it will have a right to go into court to protect their interest in such benefits if necessary.*" (Emphasis supplied.)

In the consideration of this measure by the Senate, Senator Taft took the floor and expressed himself as follows (p. 1311):

> "So that the purpose of the provision is that the welfare fund shall be a perfectly definite fund, that its purposes shall be stated *so that each employee can know what he is entitled to, and go to court and enforce his rights in the fund, and that it shall not be, therefore in the sole discretion of the union or the union leaders and useable for any purpose which they may think is to the advantage of the union or the employee.*" (Emphasis supplied.)

The trust in the *Essex* case, which the Court below relied on met this requirement. That case involved a pension trust for the sole and exclusive benefit of em-

ployees and their families. The employees, as beneficiaries, *could have gone to a Court of equity* to *enforce their rights* and prevent a diversion of the trust fund to the union. *Such is not the case here.* In this case there are no employee beneficiaries who have any rights which could assert in any Court. The *only* parties who had any voice or legal rights to say how the monies were to be expended were the union and the employer association. As stated above, the union and the employer association, the so-called trustors, were *themselves* the sole and exclusive beneficiaries of the Joint Industry Board fund.

The fund was to be expended for purposes *they* thought proper. In fact they could *change the purposes of the trust at will* with no one to gainsay them.

To illustrate the dual relationship of the parties as trustees and as beneficiaries we point out that the so-called trust agreement provides:

> "It shall be the functions of the Joint Board * * *
>
> "5. To *assist and aid the heating and sheet metal industry* in continuing the high degree of skill which it now enjoys; to provide a forum where management and labor can discuss ways and means for further cooperation; * * *" (Emphasis supplied.)

This unquestionably refers to Local Union No. 75 and to the employer association as the "industry" and as "management and labor." In other words, they proposed to "assist and aid" themselves.

When these parties further empowered the Joint Board

> "To counsel and advise and render such other assistance to individual members of the union and all employers who are signatory hereto which will aid and facilitate efforts to effectuate high standards in the industry"

they conferred upon the board power to expend the monies of the fund for any purposes which *they* considered would effectuate high standards in the industry.

Furthermore, when the parties declared it to be a function of the board (paragraph 6)

> "To foster, promote and urge beneficial legislation within the State of California * * *"

they contemplated legislation which the union itself agreed to endorse. Unless the union approved it, there would be no majority vote of trustees and the legislation would not be supported.

To sum up: There was *no one* to challenge whatever disposition might be made of the monies in the fund.

Certainly an individual employer, having irrevocably parted with his contributions to the fund would not waste his time by insisting through legal action that the funds be applied for one purpose rather than another, and as stated previously, no employee had any rights in this fund which he could take to Court to enforce.

Fairly read, we do not believe that Congress considered this remote possibility to be an adequate safe-

guard against misuse of funds of this character as suggested by the Court below. Rather it simply forbade them altogether.

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JOINT CONTROL BY EMPLOYERS DOES NOT RENDER "TRUST" VALID.

The Court below said:

> "A fair reading of the Trust Agreement of Joint Industry Board which governs the relationship of the parties thereto leads to the conclusion that the power to expend the funds contributed by the employers, resides in the Board, and is thus dependent upon the approval of the employer members."

The Labor Management Relations Act 1947 recognies many situations where employers by reason of superior economic force exerted upon them by unions are *forced* to commit acts contrary to the policy declared by Congress and to the provisions of the statute. A common illustration is that of the employer being forced to sign a union-shop agreement due to economic pressure from a union which does not in fact represent a majority of his employees. Any discrimination by the employer against his employees resulting from superior economic pressure by a union is likewise declared unlawful. In other words, *even though the employers have agreed to it,* the statute declares it unlawful. Such is the situation here. In this case it can hardly be contemplated that the employers *originated* the idea of turning the money over

to the board or volunteered to do so. Rather the so-called "agreement" was obtained by superior economic force. This does not excuse the employers. The "agreement" by the employers does not make it legal. Here is where the statute comes in. The statute was intended to apply to situations where the employer "agreed" to certain things under superior economic force. It has provided a *legal* remedy where economic strength alone is not sufficient to stave off the demand for illegal payments. This is shown by the debate on the floor of the Senate where Mr. Taft said (Leg. Hist. p. 1313):

> "* * * Unless there are some restrictions, *if such an agreement is forced upon an employer,* in effect we make the officials of the union who collect the tax government agents for collecting and distributing the tax. Under the proposed agreement originally demanded by Mr. Lewis *he could distribute the fund for the benefit of schools or he could operate anything he wished to operate in the nature of local government.* The whole thing would become a great weapon of power as it was in the case of Mr. Petrillo to dominate the union and to please the members whom he wanted to please and punish members whom he did not wish to please or who refused to go along with the policy of the union." (Emphasis supplied.)

The above quotation points up two things: First, the statute *forbids* the payments in question even though some employers have "agreed" to it. Secondly, even though the purposes may be *laudable,* as for example the establishment of schools, it was the avowed purpose of the legislation to forbid the establishment

of, or the payment into, any trust fund solely or jointly controlled by unions *except funds established for the sole and exclusive benefit of the employees themselves.*

Many examples may be given of objects and activities of the Joint Industry Board which are perfectly legitimate and which would be entirely legal *but for the prohibitions of Section 302.*

Suppose that the union desired to embark on an advertising campaign "to acquaint the public at large with the work of the Heating and Sheet Metal Industry and to foster good public relations." (Trust Agreement A (6).) By extolling the virtues of the Heating and Sheet Metal Industry presumably the public would be persuaded to purchase and to use more sheet metal products. As a result more sheet metal workers would be employed.

Yet if the union said to the employers, "You turn the money over to us and we will run the campaign", this would obviously involve a direct violation of Section 302. It would be a payment by employers to a representative of their employees for a purpose not permitted by the statute.

Instead, however, in this case the union says, "You put the money in a joint account in both our names and we will *jointly* decide how to spend it." It is submitted that such arrangement is also a violation of the statute.

However desirable or profitable or beneficial such a program might be, Section 302 declares that an

employer cannot vest a union with the control or disposition of funds in whole or in part *except for the sole and exclusive benefit of employees.*

The "Trust Agreement" (A (6)) declares as one of its purposes and objects "to foster, promote and urge beneficial legislation within the State of California".

There is hardly any limit to the purposes for which the monies in the fund could be used under this provision. For example: a campaign could be waged to make it compulsory to have an air conditioning system in every public building, thus increasing the use of sheet metal products. This would give more employment to union members. Again, *assuming* that the legislation will in fact be beneficial to the employees represented by the union, Section 302 does not permit payments by employers into a fund to be jointly administered by the employers and the union *except* for the *sole and exclusive* benefit of the employees.

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PART OF UNION OPERATING EXPENSES PAID BY FUND.

There is a more subtle but nevertheless clearly recognizable payment of a "thing of value" to the union by the assumption and performance of certain functions by the Joint Industry Board.

It is the function of a union not only to negotiate collective bargaining contracts but *to administer and enforce them.*

The Labor Management Relations Act itself defines collective bargaining as follows (Section 8 (d).):

> For the purposes of this section, *to bargain collectively* is the performance of the mutual obligation of the employer and the representative of the employees to *meet at reasonable times and confer in* good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or *any question arising thereunder.*" (Emphasis supplied.)

Thus the handling of grievances and disputes under a contract is included within the statutory definition of collective bargaining.

Heretofore the union has handled all disputes and grievances arising out of the contract *at its own expense,* including arbitration. This function is now *transferred* to the Joint Industry Board composed of an equal number of representatives of the employers and the union.

The Joint Industry Board Agreement provides:

> "A—Purposes:
>
> "It shall be the functions of the Joint Board:
>
> * * * * * * *
>
> "2—To aid in the settlement of any and all disputes of any nature whatsoever which may arise between the Union, its members, agents and/or representatives, and the above-named association, its members, and all other employers of union members who are signatories to agreements with the union.
>
> "3—To set up and administer a joint arbitration committee and to provide further arbitration pro-

> cedures should the Joint Arbitration Committee be unable to decide or resolve a dispute." (R. p. 30.)

All of the costs of the operation of the board are paid out of the 2½¢ per hour contributions of the employers. The Joint Industry Board agreement provides:

> "F—EXPENSES:
>
> The Board shall have the authority to provide for the payment of expenses for attending Board or Committee meetings or for other expenses incurred in connection with Joint Industry Board business." (R. 32.)

Thus, by paying the entire cost of "settlement of any and all disputes" * * * and the cost of arbitration the employers are thereby *paying the cost of a portion of the functions normally paid for by the union.* The employers have in this manner paid a "thing of value" to the union just as surely as if they had paid the *rent for the union hall and offices* or a part of the salaries of their officers.

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**CONCLUSION.**

The Supreme Court has declared in the *Ryan* case (*U. S. v. Ryan*) (supra) that the statute should not be strictly construed but should be *liberally* construed *to effectuate its purpose.* We quote from the opinion as follows:

"Further, a *narrow reading* of the term 'representative' would *substantially defeat the congressional purpose.*" (Emphasis supplied.)

* * * * * * *

"As the statute reads, it appears to be a criminal provision, *malum prohibitum,* which outlaws all payments with stated exceptions, between employer and representative." (LRR Vol. 37, No. 33, p. 4.)

The language of the Supreme Court is certainly broad enough to condemn vesting a union with a one-half ownership and one-half control over a fund made up of employer contributions where the fund is to be used for purposes jointly agreed upon by the union and the employers which are not purposes specified and permitted by Section 302.

The decision in this case should be governed not by form but by substance.

Appellants contend that under the statute and under the *Ryan* decision it is not necessary to a violation of Section 302 that any money be paid *directly to a union.* If this were so, payment of the union's rent to the union's landlord by the employer would be an easy evasion. Likewise, even though the money is not paid *directly to a union,* if it is paid into a fund, a trust or a bank account over which the union has in effect a general power of appointment or the right to designate how the money shall be spent, such payment constitutes the payment of a "thing of value" to the union in violation of Section 302.

In this case, however, in truth and in fact the union and the employer *jointly own and jointly control the Joint Industry Board* fund and can use the monies *for any purpose they choose.* The so-called trustees are mere agents who carry out the orders of their principals on pain of removal and replacement.

By thus vesting the union with joint ownership and control of the Joint Industry Board fund this constitutes the payment by employers to a "representative of their employees of a thing of value" in violation of Section 302. LMRA 1947.

Dated, San Francisco, California,
February 11, 1957.

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